

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 25, 2004 Session

**SHERYL LYNN PRICE v. RICHARD THEODORE BRIGHT**

Appeal from the Juvenile Court for Knox County  
No. E-1606 Cary E. Garrett, Judge

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**No. E2003-02738-COA-R3-CV - FILED JANUARY 26, 2005**

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Richard Theodore Bright ("Father") is the primary residential parent for his eight year old daughter. The child's mother is Sheryl Lynn Price ("Mother"). Father filed a petition seeking permission to relocate with his daughter to Ohio. Mother opposed the petition. After a trial, the Juvenile Court concluded the parents were not spending substantially equal amounts of time with the child and the requirements of Tenn. Code Ann. § 36-6-108(d), therefore, applied. The Juvenile Court then concluded Father had a reasonable purpose for moving to Ohio, such a move would pose no threat of specific and serious harm to the child, and Father's motive for moving was not vindictive or intended to defeat or deter Mother's visitation rights. Accordingly, the Juvenile Court granted Father's petition seeking permission to relocate to Ohio. Mother appeals raising several issues including the issue of whether the Juvenile Court had subject matter jurisdiction to hear Father's Petition to Relocate. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Ricky A.W. Curtis, Knoxville, Tennessee, for the Appellant Sheryl Lynn Price.

H. Gene Bell, Knoxville, Tennessee, for the Appellee Richard Theodore Bright.

## OPINION

### Background

In June of 1999, Father filed a petition to legitimate N.A.B., who was born on July 19, 1996. Father claimed he was the child's natural father and that he and Mother were not married when their daughter was born. Although not entirely clear from the record, the State of Tennessee, Department of Children's Services apparently filed a complaint on Mother's behalf also seeking to establish parentage. In any event, the Juvenile Court Referee entered an order in August 1999, declaring the child to be the legitimate child of Father. The Referee transferred the matter of custody to another division of the Juvenile Court, but did award temporary custody to Mother and established Father's visitation schedule.

In early August of 2000, Father filed a Petition for Emergency Protection seeking temporary custody of his daughter. According to Father, Mother and their daughter then were living in a one bedroom motel room with two other adults and another child. Father claimed the motel room was infested with head lice and his daughter had become infested. Father claimed Mother was refusing to take the steps necessary to rid the motel room of the lice. Father claimed that, with Mother's consent, he took his daughter to stay with her paternal great-grandmother in Ohio for treatment of the head lice. Father stated he also had taken the necessary steps to rid his residence of any lice that had been introduced by his daughter. Father appeared and testified before a Referee of the Juvenile Court requesting the entry of an *ex parte* temporary restraining order. After hearing Father's testimony, the Referee entered an *ex parte* temporary restraining order granting Father temporary physical custody and prohibiting Mother from removing the child from the temporary custody of Father or otherwise interfering with that custody.

A few days later Mother and Father, both of whom were represented by counsel, reached an agreement with regard to Mother's visitation with the child. This agreement was announced to the court although there is no documentation in the record setting forth its terms. Father filed a motion one week later claiming Mother had violated their agreement. Father claimed, among other things, that Mother failed to return the child to his care one evening as required and that neither Mother nor the child were at Mother's residence. Father also claimed the child was not at daycare the following morning. Based on these and other allegations, the Juvenile Court Referee entered another temporary restraining order requiring Mother to return physical custody of the child to Father immediately. After the temporary restraining order was entered, Mother filed a response to the issuance of that order and denied that she improperly refused to return the child to Father and requested that the temporary restraining order be dissolved.

In late August of 2000, a hearing was held on the temporary restraining order and the parties once again were able to reach an agreement with regard to co-parenting time. Pursuant to this agreement, Father was to have physical custody of the child in the evenings on Sunday through Thursday beginning at 7:00 p.m., and continuing until the next morning when he was to take the child to daycare. Mother was to pick the child up from daycare and have physical custody of the

child until 7:00 p.m. If Mother was not working on a weekday and if she provided Father with twenty-four hour notice, Mother could keep the child overnight and continuing until 8:30 a.m. the next morning. With regard to the weekends, the order provided that each party was to exercise co-parenting time on alternating weekends. The Referee incorporated the terms of the parties' agreement into an order and thereafter scheduled a hearing in January of 2001, at which time all remaining issues, including Father's petition for custody, were to be heard.

The Referee was able to dispense with the next scheduled hearing because the parties reached an agreement which was incorporated by the Referee into an order entered on May 15, 2001. This order provided that the parties had joint legal custody and established co-parenting time in the same manner set forth in the previous order. The Referee apparently intended for this custody order to be temporary as neither party was designated as the primary residential parent and the Referee set the next hearing for September 10, 2001.

The record does not show whether a hearing was conducted in September. However, a hearing was held the following February and an order was entered following that hearing which provides, in relevant part, as follows:

#### CUSTODY

1. The father and mother shall exercise joint legal custody and physical custody of [the child].
2. The father, Richard Theodore Bright, shall be the primary residential custodian.

#### CO-PARENTING/VISITATION

3. The mother, Sheryl Lynn Price, shall exercise visitation on three weekends per month from 6:00 p.m. on Friday until 6:00 p.m. on Sunday upon a schedule to be mutually agreed by the parties. Absent such an agreement the mother's visitation shall be the first, second, and third weekends of each month....

In May of 2003, Father filed a Petition for Permission to Move Out of State. In this petition, Father noted that although he and Mother had joint legal custody, he was the primary residential parent. According to Father, he was from Ohio and has several close relatives living in or around Marengo, Ohio. Father claimed that his daughter recently was ill and Mother refused to assist him with her care, requiring Father to miss work. Father alleged that Mother "was too busy with her work and schooling to assist ... [and Mother's] boyfriend keeps the child by himself" when Mother is working or at school. Father stated he had three job offers in Ohio and that any one of these jobs would increase his income substantially and also would provide better health insurance. Father also indicated that he had been approved for the purchase of a house in Ohio. In short, Father

claimed it would be in the best interests of the child for him to move with her to Ohio. Father stated he would work with Mother and the court to establish an appropriate visitation schedule if he and the child were permitted to move.

Mother quickly filed a Petition in Opposition to Relocation, Petition to Alter or Amend, and Request for Temporary Injunction. In this petition, Mother claimed Father had failed to comply with the requirements of the parental relocation statute, Tenn. Code Ann. § 36-6-108. Mother also claimed the requirements of Tenn. Code Ann. § 36-6-108(c) applied because she was exercising substantially equal co-parenting time. Mother maintained that it was not in the child's best interest for Father to be allowed to move with the child to Ohio. Mother requested Father's petition to relocate be denied, that the court alter or amend the previous order and designate Mother as the primary residential parent, and that the court enter a temporary injunction prohibiting Father from moving with the child to Ohio.

The Referee entered a temporary injunction prohibiting Father from relocating to Ohio with the child pending Father's compliance with Tenn. Code Ann. § 36-6-108 and the completion of an evidentiary hearing as contemplated by Tenn. Code Ann. § 36-6-108(c). The evidentiary hearing was held on August 21, 2003, after which the Referee concluded Mother was exercising co-parenting time from Thursday at 3:00 p.m. until Sunday at 6:00 p.m. for three weeks out of every month. The Referee concluded that Mother's co-parenting time was sufficient to conclude the parties were spending "substantially equal" co-parenting time and, therefore, the requirements of Tenn. Code Ann. § 36-6-108(c) applied. The Referee then concluded that it was not in the child's best interest to move with Father to Ohio. The Referee denied Father's petition and reserved the remaining issues for further hearing, if necessary.

Father immediately filed a *de novo* appeal to the Juvenile Court Judge and a new evidentiary hearing was conducted on August 28<sup>th</sup> before the Juvenile Court. At this hearing, Father testified that he hoped to move with his daughter to Marengo, Ohio. Most of Father's relatives including his mother, grandmother, and numerous cousins live in that area. Father stated that his mother and grandmother would assist him as needed with caring for his daughter. Father explained that recently he had shattered his ankle at work and his grandmother came to Tennessee and stayed with him for two or three months to assist him with caring for his daughter. According to Father, his daughter is very familiar with his relatives in Ohio and his daughter is looking forward to moving there.

Father acknowledged that Mother has several relatives in the East Tennessee area, including a sister, an aunt, and several cousins. Father also acknowledged on cross-examination that Mother and many of Mother's relatives have a good relationship with the parties' daughter. According to Father, Mother does not speak with her mother who lives in Sevier County and has custody of Mother's other daughter. Father explained that Mother also has two sons who live in Ohio and "[o]ne lives with the paternal grandparents. The other one lives with the father." Mother's two sons living in Ohio are approximately thirty miles from Marengo.

Father testified that if he is allowed to move to Ohio with his daughter, Mother could come to Ohio and visit the child anytime she wants. One of the reasons Father wants to move to Ohio is because of his close relationship with his relatives. In addition, there are many good employment opportunities available to Father there. Father earns \$15,000 to \$20,000 annually at his job in Tennessee, but he has been offered a job in Ohio making \$19.50 per hour as base pay. This job in Ohio also has a benefit package including a 401K, paid vacations, health insurance with family coverage, and a pension plan. Father testified he has been approved for a loan to purchase a house in Marengo and has located a house he intends to purchase if he is allowed to move with his daughter. However, if the court does not allow him to move with his daughter, Father stated he will remain in Tennessee.

With regard to co-parenting time, Father testified that typically Mother exercises co-parenting time from Thursday afternoon until Sunday evening, three weeks per month.<sup>1</sup> On the week when Mother does not exercise co-parenting time over the weekend, Mother has co-parenting time for one day. Based on Father's calculations, Mother's combined co-parenting time totals ten days out of each month. Father has physical custody of the child the remaining twenty to twenty-one days, depending on how many days are in the month. On cross-examination, Father acknowledged that on weekends when Mother is exercising co-parenting time, she spends more actual time with their daughter than he does on Thursday through Sunday.

According to the co-parenting schedule, it was Mother's turn to have their daughter for the entire week of spring break in 2002. However, Father claimed Mother exercised co-parenting time only on the other regular scheduled days. Father added that Mother did not keep the child for three weeks in the summer of 2002 although the court order allowed her three full weeks. Mother did keep the child for three weeks in the summer of 2003 once she learned Father was planning to move to Ohio. Father further testified that Mother lived with her current husband for two years before they were married, and that Mother and her boyfriend/husband also lived with Mother's stepfather. Mother works every other weekend from 11:00 p.m. until 7:00 a.m. on Friday and Saturday nights. Father stated that on those weekends when Mother has physical custody of the child and is working, Mother's boyfriend/husband and stepfather care for the child.

Father described his relationship with Mother as "up and down" although, for the most part, they have "done pretty well," at least until Father informed Mother of his intent to move to Ohio. According to Father, Mother called him on the telephone the night before the hearing and she "used the F word several times, called me several profound (sic) names."

The parties' daughter is seven years old and attends Gap Creek School in Knox County. The child attends an individual education program because she is behind in math, but she is making progress and doing well. Father stated his daughter has improved in school since he was awarded primary residential custody. The child was tardy to school fourteen times when Mother was

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<sup>1</sup> Although the order provides for Mother's visitation to begin at 6:00 p.m. on Friday, the parties agreed some time ago for Mother to begin her co-parenting time at 3:00 p.m. on Thursday.

the primary residential parent, and zero times while Father has been the primary residential parent. Father added that his daughter received an award last year for being the most improved student in her class.

Krista Beaty ("Beaty") is Mother's younger sister and was called as a witness. Beaty testified that both Mother and Father are very good parents and have a close relationship with their daughter. Beaty testified that she gets along "great" with Father and Beaty's son occasionally spends the weekend with Father. Beaty stated that Father currently is doing some construction work at her house. Beaty acknowledged that Mother and Father have been "getting along" and Father has even told her that they have been "getting along very well." Beaty testified that, in her opinion, moving to Ohio would be a very difficult adjustment for her niece.

Christopher Richard Bradfield ("Bradfield") married Mother in June of 2003, although they have been in a relationship for three years. Bradfield testified that he has a good relationship with his stepdaughter, as do the other members of Mother's family. Bradfield acknowledged that both parties have a very good relationship with their daughter. Bradfield is in the process of purchasing a house in Powell, Tennessee. Bradfield admitted that he took care of the child "quite a bit" every other weekend when he was dating Mother and that he continues to do so. Bradfield admitted having spent the night with Mother before they were married and that this conduct violated a court order. Bradfield believed that moving to Ohio would have a negative impact on his stepdaughter.

Mother testified that she currently resides with her husband and her stepfather. Mother denied actually living with Bradfield prior to their marriage. Mother testified to the strong bond that her daughter has with Mother's various relatives, including Mother's sister and stepfather. Mother also testified to the strong bond she has with her daughter and the various extracurricular activities they participate in together.

Mother described her relationship with Father as "very good." Mother stated that Father even offered to help with Mother's wedding to Bradfield, and that he assured her that their daughter would be at the wedding. Of course, there are times when Mother and Father have disagreements, but they are careful to make sure they do not argue in front of their daughter. In direct contrast to Father's testimony, Mother testified their daughter is upset about moving to Ohio. Mother's major concern about her daughter moving to Ohio is breaking the bond which has developed between them resulting from the child staying with Mother several days per week.

Mother testified that she never sees her two sons who live in Ohio. The State of Tennessee has custody of Mother's other daughter, but guardianship of that daughter has been placed with Mother's mother who lives in Sevier County. Mother pays child support for only one of her sons in Ohio. Mother stated the reason she did not take the parties' daughter for three weeks the previous summer and for spring break in 2002 was because she was attending college classes and working. Mother testified that she has accumulated approximately four months of leave and comp time at work.

After reviewing the facts, the Juvenile Court concluded that Father and Mother were not spending substantially equal amounts of time with their daughter. Specifically, the Juvenile Court stated:

Long before June, 2003 the testimony established that [Mother's] then boyfriend kept [the child] on the weekend's of [Mother's] visitation which he continues to do. She works on these weekends at night and has to sleep during the day. This was [Mother's] choice although she testified she had over four (4) months comp and leave time built up in addition to sick leave. This dramatically reduced the time [the child] spent with her mother. Although on the face of the Order it appears that the mother had more than the usual visitation time, in reality she did not.

The Court therefore finds that the parents are not actually spending substantial[ly] equal intervals of time with the child. The Court finds that the father who has physical custody, spends the greater amount of time with [the child] and therefore TCA 36-6-108(d) applies in this case.

The Juvenile Court went on to conclude: (1) Father's relocation to Ohio had a reasonable purpose; (2) there was no evidence that relocating would pose a threat of specific and serious harm to the child; and (3) Father's motive for moving was not vindictive or intended to defeat or deter Mother's visitation rights. The Juvenile Court then granted Father's petition to relocate and denied Mother's request that she be awarded primary residential custody.

Mother appeals raising the following issues, which we quote:

1. Whether the Knox County Juvenile Court had subject matter jurisdiction to adjudicate the Father's Petition to Move out of State?
2. Whether, if the Juvenile Court had jurisdiction to hear the issue, the Juvenile Court applied the correct subsection of Tenn. Code Ann. § 36-6-108?
3. Whether, based on the evidence presented at trial, the Juvenile Court's finding that the Father had a "reasonable purpose" for moving to Ohio was against the preponderance of the evidence?
4. Whether the Juvenile Court exceeded the authority it may have had by ruling on issues not properly before it on appeal?

## Discussion

The factual findings of a trial court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The first issue we must address is whether the Juvenile Court had subject matter jurisdiction to hear Father’s petition to relocate. Because juvenile courts are courts of limited jurisdiction, their subject matter jurisdiction is defined by statute. *See Stambaugh v. Price*, 532 S.W.2d 929, 932 (Tenn. 1976). The juvenile courts are granted exclusive original jurisdiction over matters listed in Tenn. Code Ann. § 37-1-103, and concurrent jurisdiction over matters listed in Tenn. Code Ann. § 37-1-104. Mother correctly notes that petitions to relocate pursuant to Tenn. Code Ann. § 36-6-108 are not specifically listed in either of these jurisdictional statutes.

This litigation began in 1999 with Father’s petition to establish paternity. At that time, it was unclear whether the juvenile courts had exclusive or concurrent subject matter jurisdiction over such petitions. Tenn. Code Ann. § 37-1-103<sup>2</sup> granted the juvenile courts exclusive original jurisdiction over claims to establish paternity of children born out of wedlock, while Tenn. Code Ann. § 36-2-307(a)(1) granted jurisdiction of paternity claims to “[t]he juvenile court or any trial court with general jurisdiction.”<sup>3</sup> In *P.E.K. v. J.M.*, 52 S.W.3d 653 (Tenn. Ct. App. 2001), we addressed the conflict between these two statutes. After noting that Tenn. Code Ann. § 36-2-307(a)(1) was passed roughly twenty-seven years after the passage of Tenn. Code Ann. § 37-1-103, we held “that the later statute, Tenn. Code Ann. § 36-2-307(a)(1), amended Tenn. Code Ann. § 37-1-103 such that the juvenile court no longer has exclusive jurisdiction over paternity matters.” *Id.* at 659-660. Based on the foregoing, we readily conclude that the Juvenile Court had subject matter jurisdiction over Father’s petition to establish paternity, regardless of whether that subject matter jurisdiction was concurrent or exclusive. It necessarily follows that the Juvenile Court also had subject matter jurisdiction over the initial custody determination because Tenn. Code Ann. § 36-2-311(a) mandates that upon establishing parentage, “the court shall make an order declaring the father of the child” and the order “shall” include, among other things, a “[d]etermination of the custody of the child” and a “[d]etermination of visitation.” *See* Tenn. Code Ann. §§ 36-2-311(a)(9) and (10).

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<sup>2</sup> Tenn. Code Ann. § 37-1-103(a) was amended in 2003 and the portion of that statute purporting to grant juvenile courts exclusive subject matter jurisdiction over paternity actions was deleted.

<sup>3</sup> Tenn. Code Ann. § 36-2-307(a)(1) excepted counties with a population of more than 825,000 and less than 830,00 according to the 1990 federal census. In counties with a population in this range, “only the juvenile court” had jurisdiction of paternity claims.



After obtaining subject matter jurisdiction over the original custody determination, the Juvenile Court continued to exercise that subject matter jurisdiction when it granted Father's request for a temporary restraining order and transferred temporary custody of the child to Father based on allegations that Mother was neglecting the child. Tenn. Code Ann. § 37-1-103(a)(1) grants juvenile courts exclusive jurisdiction over proceedings where a child is alleged to be dependent and neglected. Father's allegations that his daughter was infested with head lice and Mother was taking no action to rid her daughter or her residence of the lice would certainly appear to constitute an allegation of neglect as that term is defined in the applicable statute. We further note that the Juvenile Court Referee specifically entered the temporary restraining order pursuant to Tenn. Code Ann. § 37-1-152, which specifically grants juvenile courts authority to enter such orders when certain requirements are met.

Having determined that the Juvenile Court properly had subject matter jurisdiction over issues surrounding the custody of the parties' child, we also conclude that the Juvenile Court maintained that subject matter jurisdiction. Tenn. Code Ann. § 37-1-103(c) unequivocally states that "[w]hen jurisdiction has been acquired under the provisions of this part, such jurisdiction shall continue until the case has been dismissed, or until the custody determination is transferred to another juvenile, circuit, chancery or general sessions court exercising domestic relations jurisdiction, or until a petition for adoption is filed...."

In fairness to Mother, she does not claim the Juvenile Court did not or does not have subject matter jurisdiction over custody issues. This is best shown by the fact that when Mother filed a petition in opposition to Father's relocation, she also filed a petition to alter or amend the previous custody determination which designated Father as the primary residential parent. What Mother does argue is that the Juvenile Court did not have subject matter jurisdiction over Father's petition to relocate. We have taken the time to establish the Juvenile Court's subject matter jurisdiction over various other disputes between these parties concerning their daughter which arose prior to the filing of Father's petition to relocate because, in our opinion, that jurisdiction significantly impacts the subject matter jurisdiction issue raised by Mother.

The parental relocation statute, Tenn. Code Ann. § 36-6-108, contains several requirements for a parent intending to relocate with his or her child. Initially, § 36-6-108(a) requires the relocating parent to send a notice to the other parent containing certain specific information, including the right of the non-relocating parent to file a petition opposing the relocation. If the parents are unable to agree on a new visitation schedule, then the relocating parent is required to file a petition "seeking to alter visitation." Tenn. Code Ann. § 36-6-108(b). If the parents spend "substantially equal" intervals of time with their child, then the court is required to determine whether to permit relocation based on the best interests of the child. A non-exclusive list of eleven factors to be considered when making a best interests analysis is contained in the statute. *See* Tenn. Code Ann. §§ 36-6-108(c)(1) - (11).

If the parents are not spending "substantially equal" intervals of time with the child and the parent spending the greater amount of time with the child is the parent who is seeking to

relocate, then relocation “shall” be permitted unless the court finds one or more of the three factors listed in Tenn. Code Ann. § 36-6-108(d) are present. These three factors are:

- (1) The relocation does not have a reasonable purpose;
- (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change in custody; or
- (3) The parent’s motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. §§ 36-6-108(d)(1) - (3). The trial court is required to undertake a best interests analysis under Tenn. Code Ann. §§ 36-6-108(d) and (e) only if it finds at least one of these three factors are present. According to the statute:

If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors ....

Tenn. Code Ann. § 36-6-108(e).

We hold that the issues a trial court must consider when a parent seeks permission to relocate are so intertwined with the concept of custody that a court having subject matter jurisdiction over custody of a child also has subject matter jurisdiction over a petition to relocate filed by one of the child’s parents. We reach this conclusion for two primary reasons. First, when a parent seeks to relocate as that term is defined in the statute, in all likelihood the current visitation schedule will no longer be practical.<sup>4</sup> The court and the parties thus will need to craft a new visitation schedule if the parent is permitted to relocate. The amount of co-parenting time both parents have is an integral part of any custody order regardless of which parent is designated the primary residential parent. In *Branch v. Thompson*, No. M2001-01231-COA-R3-CV, 2002 Tenn. App. LEXIS 821 (Tenn. Ct. App. Nov. 26, 2002), *no appl. perm appeal filed*, we noted that “the concept of ‘custody’ connotes a complex bundles of rights and obligations arising from the parent-child relationship.” We went on to add in that case that once the juvenile court had acted within its

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<sup>4</sup> The statute applies when “a parent who is spending intervals of time with a child desires to relocate outside the state or more than one hundred (100) miles from the other parent within the state ...” Tenn. Code Ann. § 36-6-108(a).

subject matter jurisdiction in determining a change of custody was appropriate, the juvenile court “necessarily had to adjust the component parts of custody including visitation ....” 2002 Tenn. App. LEXIS 821, at \*\* 12, 14.<sup>5</sup>

The second and perhaps most important reason for concluding that a court having subject matter jurisdiction over custody also has subject matter jurisdiction over a parent’s petition to relocate is based on the plain language of the parental relocation statute. As noted above, there are times when a trial court may be required by the statute to make a custody determination while resolving a petition to relocate. *See* Tenn. Code Ann. § 36-6-108 (e), *supra*. Because parents often dispute whether they are spending “substantially equal” intervals of time with their child, neither the parties nor the trial court will know in these cases whether the trial court will apply the requirements of subsection (c) or subsection (d) until after all of the proof has been presented. The reasons for filing a petition to relocate with a court having subject matter jurisdiction over the child’s custody thus become quite apparent as custody or a change of custody may well have to be decided by that court as part of its decision concerning relocation.

We hold that because a petition to relocate filed pursuant to Tenn. Code Ann. §36-6-108 necessarily involves matters of visitation and could result in a new custody determination, that petition should be filed with a court having subject matter jurisdiction over custody of the child. Since the Juvenile Court in the present case had subject matter jurisdiction over custody of the parties’ child, we conclude the Juvenile Court likewise had subject matter jurisdiction over Father’s petition to relocate.

The next issue is whether the Juvenile Court erred when it concluded Mother was not spending “substantially equal” co-parenting time with the child and, therefore, Tenn. Code Ann. § 36-6-108(d) rather than Tenn. Code Ann. § 36-6-108(c) applied. Recently, the Middle Section of this Court stated the following regarding the “substantially equal” determination:

Tenn. Code Ann. § 36-6-108 does not define the term “substantially equal.” However, no special definition is required because the common meaning of the words and the phrase are easily understood. The word “substantially” means “essentially,” “to all intents and purposes,” or “in regard to everything material.” 17 OXFORD ENGLISH DICTIONARY 68 (2d ed. 1989). Thus, the plain meaning of the term “substantially equal” connotes a relationship that is very close to equality - so close that it may be considered equal.

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<sup>5</sup> The Uniform Child Custody Jurisdiction and Enforcement Act of 1999 defines a “child custody proceeding” as “a proceeding in which legal custody, physical custody, *or visitation* with respect to a child is an issue....” Tenn. Code Ann. § 36-6-205(4)(emphasis added). We do not and need not decide whether this statute has any applicability to the present case but simply note its definition of a “child custody proceeding.”

The courts have not provided bright-line rules for determining whether parents are spending "substantially equal" custodial time with their children. As convenient as a bright-line rule might be, we see no need to adopt one because custody decisions, by their very nature, are inherently fact-dependent. Courts must have flexibility to consider the parents as they find them. However, courts called upon to determine whether parents are spending substantially equal amounts of time with their children should consider, among other things: (1) the terms of the applicable custody and visitation orders, (2) the number of days each parent has actually spent with the child or children, (3) whether the parents are using the full amount of residential time provided them, (4) the length of the period during which the comparison of residential time is being made, and (5) the particular exigencies of the parent's circumstances.

*Collins v. Coode*, No. M2002-02557-COA-R3-CV, 2004 Tenn. App. LEXIS 267, at \*\* 9-10 (Tenn. Ct. App. Apr. 27, 2004)(footnotes omitted), *no appl. perm appeal filed*.

Mother claims all day Thursday should be counted in her favor since she spends more actual time with the parties' daughter than does Father on that day. The proof shows that the child is with Father from Thursday morning at 12:00 a.m. until he takes the child to school. Thereafter, Mother picks the child up from school at 3:00 p.m. and cares for her the rest of the day. While Mother may spend more time with the child on Thursday while the child is awake, this Court had refused to characterize time spent with a child in this narrow fashion. See *Kawatra v. Kawatra*, No. M2003-01855-COA-R3-CV, 2004 Tenn. App. LEXIS 580, at \* 9 (Tenn. Ct. App. Aug. 31, 2004), *appl. for perm. appeal pending*, ("[W]e believe that the trial court erred in deducting school time from the calculation of the time spent with each parent, since the responsibility of a parent does not end while the child is at school."); *Clark v. Clark*, No. M2002-03071-COA-R3-CV, 2003 Tenn. App. LEXIS 926, at \*\*13, 14 (Tenn. Ct. App. Dec. 30, 2003), *no appl. perm. appeal filed*, ("There are no cases in which the courts of this state have approved of a comparison of custodial time based upon waking hours only. . . . [W]e see no reason to adopt the "waking hours" methodology . . . either as a general principle or for the purposes of this particular case."). Since Father is responsible for the child from 12:00 a.m. until 3:00 p.m. on Thursday, we believe Father should be credited with having the child for 15 hours on Thursday, with Mother being credited with the remaining 9 hours. With regard to Sunday, the child is in Mother's care from 12:00 a.m. until 6:00 p.m., for a total of 18 hours. In a week when Mother has weekend co-parenting time, she has the child for 9 hours on Thursday, 24 hours on Friday, 24 hours on Saturday, and 18 hours on Sunday, for a total of 75 hours. Father has the child for 6 hours on Sunday, 24 hours on Monday, 24 hours on Tuesday, 24 hours on Wednesday, and 15 hours on Thursday, for a total of 93 hours. Since Mother has weekend co-parenting time for three weekends each month, Mother's total co-parenting time for these three weeks is 225 hours ( $75 \times 3 = 225$ ). Father's total co-parenting time for these three weeks is 279 hours ( $93 \times 3 = 279$ ). Of the nine days remaining in each month, Mother has one day or 24 hours

of co-parenting time, with Father having the remaining 8 days, or 192 hours.<sup>6</sup> The end result is that each month Mother has co-parenting time for 249 hours which equals 34.6% of the time, with Father having co-parenting time the remaining 471 hours, or 65.4% of the time. Mother admittedly did not keep the child for spring break in 2002 or for three weeks that summer. Because Mother's exercise of additional co-parenting as authorized by the order is admittedly sporadic, we do not feel compelled to alter these percentages in any way.

Since Mother's co-parenting time equals 34.6%, as compared to Father's 65.4%, we conclude the Juvenile Court did not err when it determined the parties were not spending "substantially equal" co-parenting time and, therefore, Tenn. Code Ann. § 36-6-108(d) applied. *See Kawatra v. Kawatra*, No. M2003-01855-COA-R3-CV, 2004 Tenn. App. LEXIS 580, at \* 12 (Tenn. Ct. App. Aug. 31, 2004), *appl. perm. appeal pending*, (concluding that a parenting time split of 36% to 64% was not substantially equal under the facts of that case); *Branham v. Branham*, No. E2003-01253-COA-R3-CV, 2004 Tenn. App. LEXIS 200, at \*\*6, 7 (Tenn. Ct. App. Apr. 2, 2004), *no appl. perm appeal filed*, (concluding that a parenting time split of 40% to 60% was not substantially equal under the facts of that case).

The next issue is Mother's claim that even if the Juvenile Court correctly held that Tenn. Code Ann. § 36-6-108(d) applied, it nevertheless erred when it concluded there was a reasonable purpose for the move. Father testified to several reasons for his relocating, including better job opportunities in general and, more importantly, a better job actually offered to him. Father also testified to the strong support system he would have in Ohio with his mother, grandmother, and other relatives in the immediate area. Father also testified that he had been approved for a loan to buy a house. Regardless of whether any one of these reasons, standing alone, would be sufficient for the move to be deemed reasonable, the Juvenile Court found all three reasons to be present when concluding Father had a reasonable purpose for relocating. We agree. We find no error by the Juvenile Court when it concluded Father had a reasonable purpose for the move to Ohio.

Mother's final issue is her claim that because the Referee did not rule on her petition to alter or amend the final custody determination, Mother's request for a change in custody never was appealed to the Juvenile Court. Hence, Mother argues that the Juvenile Court exceeded its authority when it denied Mother's petition for a change in custody.

Once a valid custody order has been issued, a subsequent modification can occur only if a material change in circumstances has occurred which makes a change in custody in the child's best interests. *See Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002). The document filed by Mother in response to Father's petition to relocate was a "Petition in Opposition to Relocation, Petition to Alter or Amend, and Request for Temporary Injunction." With this document, Mother put at issue not only the propriety of Father's relocation, but the propriety of his continued designation as primary residential parent. Prior to the hearing before the Referee, the parties

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<sup>6</sup> If we average each month to include thirty days, this shorts Father a total of five days per year. We have used this average because the extra five days Father would be exercising co-parenting time does not affect the ultimate result.

stipulated that Mother's request for a change in custody would be reserved for further adjudication, if necessary. When the Referee denied Father's petition to relocate, the Referee also stated that "[a]ll other issues are reserved for further hearing if necessary."

An appeal from a Referee's decision is made pursuant to Tenn. Code Ann. § 37-1-107(e), which has been held by this Court to contemplate a "traditional *de novo* hearing" as in an appeal from a general sessions court to a circuit court. *Kelly v. Evans*, 43 S.W.3d 514, 515 (Tenn. Ct. App. 2000). When cases are appealed *de novo* from general sessions court to circuit court, they are "treated for all purposes as if they originated in the circuit court." *B & G Construction, Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000)(quoting *Ware v. Meharry Medical College*, 898 S.W.2d 181, 186 (Tenn. 1995)). If we treat this case appealed to the Juvenile Court Judge as if it originated there, then certainly that Juvenile Court Judge cannot be held to have exceeded his authority when ruling on a matter put directly at issue by one of the parties. We also note that Mother does not claim there was a stipulation regarding the scope of the trial before by the Juvenile Court Judge. Mother likewise does not claim that she actually had evidence of a material change in circumstances that she did not present to the Juvenile Court Judge because of the stipulation made to the Referee. It is logical that if evidence of a material change in circumstances did in fact exist, Mother would have presented it to the Juvenile Court Judge. This is even more apparent given Mother's primary position before the Juvenile Court Judge which was: (1) Tenn. Code Ann. §36-6-108(c) applies and that section requires the court to make a best interests of the child determination, and (2) relocation was not in the child's best interests.

When the Juvenile Court Judge denied Mother's request for a change in custody, it stated that a change in custody "would not be in [the child's] best interest." Mother certainly presented evidence on the best interests analysis and this issue was fully litigated and argued. Even though the Juvenile Court Judge was not required to make a best interest analysis because he ultimately concluded Tenn. Code Ann. § 36-6-108(d) applied and none of the three factors listed in that subsection were found to exist, this does not mean that what was in the child's best interests was not fully litigated, and it, in fact, was so tried and decided by the Juvenile Court Judge.

If Mother is arguing that the Juvenile Court now should make a separate best interests of the child determination based upon a material change of circumstances with that material change of circumstances being Father's court approved relocation to Ohio, that position is totally without merit. To adopt Mother's position that a relocation approved by a court pursuant to Tenn. Code Ann. § 36-6-108(d) is a material change of circumstances requiring a best interests of the child determination would be to read into sub-section (d) a best interests determination requirement that our Legislature chose not to include. It is not the role of this Court to amend by judicial order a statute enacted by our Legislature.

As noted at length previously in this Opinion, the parental relocation statute permits a court to change custody of a child if certain criteria are met. This can happen regardless of whether the non-custodial parent files a separate petition for change in custody. Because custody can be at issue by the very terms of the parental relocation statute, Mother cannot be heard to complain that

the Juvenile Court Judge erred when rendering an opinion on that issue. It would be a waste of judicial resources to allow a trial on the various issues relevant to the parental relocation statute, including custody and the child's best interests, and then turn around and have a second trial on Mother's petition for a change in custody involving many of the very same issues with much of the same proof. Mother's claim that her petition for a change in custody is still magically hanging out there is nothing more than her attempt to get a second bite at the apple. There was absolutely no evidence presented to the Juvenile Court of the existence of a material change in circumstances such that a change in custody would be in the child's best interest. We find no error with the Juvenile Court's decision that a change of custody would not be in the child's best interest. The Juvenile Court's denial of Mother's request for a change in custody is affirmed.

### **Conclusion**

The Judgment of the Juvenile Court is affirmed, and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are assessed against the Appellant, Sheryl Lynn Price, and her surety.

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D. MICHAEL SWINEY, JUDGE